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Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

GLORIA L. MESSINA, as Administratrix of the goods, chattels and credits which were of JOSEPH C. MESSINA, deceased,

Petitioner,

v.

CLARK EQUIPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION

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In the

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OCTOBER TERM, 1958

No. 863

Gloria L. Messina, as Administratrix of the goods, chattels and credits which were of Joseph C. Messina, deceased,

Petitioner,

v.

Clark Equipment Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION

Opinions Below

No opinion was delivered in the District Court. The opinion of the Court of Appeals for the Second Circuit (Appendix A—Petitioner's Brief) is reported in 263 Fed. (2d) 291.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 2, 1959 (Appendix A, p. 20). The petition for writ of certiorari was served on April 21, 1959.

The jurisdiction of this Court is invoked under Section 1254 (1) of 28 U. S. Code.

Question Presented

Whether under the applicable New York law, a manufacturer of a machine "dangerous because of the way in which it functions and patently so, owes to those who use it a duty merely to make it free from latent defects or concealed dangers."

Statement

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit affirming a judgment of the District Court dismissing plaintiff's complaint in an action for wrongful death.

Joseph C. Messina (hereinafter referred to as decedent) sustained fatal injuries on November 17, 1955, at about 3:40 P. M., while operating a machine known as Michigan Tractor Shovel, Model 75 A (hereinafter referred to as machine), at a building project in Port Chester, New York (7a, 10a, 12a).

The machine, manufactured by defendant, had been purchased about 3 months before the accident by Messina & Briante, Inc., on a lease-purchase arrangement from United Traction Company and had been on the said building project for about 30 days (10a, 11a, 43a, 44a).

Decedent was a one-third owner of Messina & Briante, Inc., owner of the said machine (11a, 12a).

Decedent held an Engineer's book in the Engineers' Union to operate a shovel, bulldozer. He could operate any machine the corporation owned (11a) and during the 4 days prior to the accident, no one except the decedent operated the aforesaid machine (43a).

In front of the machine there was a bucket which was attached to the body by 2 arms, one on each side (9a, Pltf's. Exhs. 1-5). To the right of the seat in the operator's compartment there are 2 levers, round knobs mounted on rods 8 to 10 inches long. One lever raises and lowers the bucket and the other dumps, opens and closes the bucket (19a).

Inside the lever itself are notches and when the lever is moved to a position, it detents itself. When the lever is pulled back it is in a notch—a strong rooted poppit in a groove and it takes some effort by the operator to get it out of the notch (19a, 42a). The lever would not move itself by the vibration of the machine. It would take about 8 pounds pressure to move the lever from the position in which it is placed (42a). The bucket can be lowered when the motor is not running but won't come down unless the levers are moved (46a).

Access to the cab was from the left side and not from the right side. On the left side there were steps for the operator to mount (19a, 20a, 44a).

On the day of the accident John Briante, who was a master mechanic, received a report that the gas tank, located in the front of the machine was leaking (9a, 12a, 13a). He saw decedent working with the machine when he got there (12a). The machine was moved 150 to 200 feet along an asphalt road to a dry place (14a). Briante told decedent to raise the bucket so he (Briante) could get under the bucket to get at the gasoline tank. Decedent raised the bucket and shut off the motor (14a, 15a).

Briante was lying on his back under the bucket and, shortly therafter another employee, Rocco Scappatura,

yelled that the bucket was coming down and to run (8a, 13a, 15a, 16a, 48a). Briante ran one way, to the left of the machine, and Scappatura the other (15a).

Scappatura noticed that decedent was between the arm and cab of the machine on the right side. Decedent was facing toward the cab, his hand, head and left leg inside the cab, the arm of the machine across the small of his back and his hip and right leg, which was resting on the top of the tire, were outside the cab. The bucket was one-half way down (8a, 9a, 10a, 16a, 17a, 44a, 45a, 46a).

Briante crawled under the arm on the right side, got into the cab, raised the bucket and he and Scappatura removed the decedent (9a, 10a, 16a, 17a).

A copy of Michigan Tractor Shovel Operators' Manual, 75-A (Deft's. Exh. A) was kept in Messina & Briante, Inc.'s yard, where everyone could look at it (46a, 47a). In said Manual, page 7, were the following instructions:

"Operating Instructions:

"A careful operator is the best insurance possible against an accident, therefore, the following safety rules should be observed at all times.

1. The operator shall not leave the machine without first lowering the bucket so that it rests on the groun and making sure all control levers are in neutral position.

2. Never reach between the boom and guide bar to lower the bucket. The bucket can be lowered to the ground even though the engine has been shut off."

John Briante had never seen the decedent get out of the cab when the bucket was not fully lowered (48a). About two months after the machine was obtained, when he saw some machine operators get out of the cab when the bucket was not on the ground, he warned them against doing so.

not because he had read in the Manual that it was a dangerous practice, but he knew it was dangerous (47a, 48a, 49a).

Petitioner contends, in substance, that the decision of the Court of Appeals for the Second Circuit is (1) contrary to the decisions of the New York Court of Appeals and (2) contrary to a previous decision of the court below.

There is no conflict.

POINT I

Defendant owed no duty to decedent and was therefore not liable to plaintiff.

(a)

No claim was made nor was evidence produced upon the trial of the existence of a latent defect or a danger not known to decedent. In fact, plaintiff conceded that her claim was not based on (1) a latent defect; (2) a danger unknown to decedent; (3) the absence of guards or a stopping device unknown to decedent (49a).

The rule in New York is that a manufacturer owes a duty to remote users "only if the defect or danger be not 'known' or 'patent' or discoverable 'by reasonable inspection'" (*Campo* v. *Scofield*, 301 N. Y. 468, 473).

The aforesaid rule, decisive of the instant case, is discussed at length in the cases of *Campo* v. *Scofield*, 301 N. Y. 468 and *Inman* v. *Binghamton Housing Authority*, 3 N Y. 2d 137.

***Campo* v. *Scofield*, 301 N. Y. 468, 471-475.**

> "The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly,

if a remote user sues a manufacturer of an arti for injuries suffered, he must allege and prove t existence of a latent defect or a danger not known plaintiff or other users. Examination of the complai before us reveals the absence of any such recita Apart from the purely conclusory allegations that t machine was negligently designed and constructed an was in a defective and imminently dangerous cond tion—which of course do not spell out a cause o action (see, e.g., *Schweitzer* v. *Mindlin*, 248 N. Y 560; see, also, 3 Carmody on New York Practic [2d ed.], § 915, pp. 1745-1752)—the complaint mere recites that defendants failed and omitted to provi any guards that would prevent the user of the ma chine from coming in contact with the revolving roller and to provide a stopping device by means of whic one whose hand became caught in the rollers coul stop the machine and thereby lessen the extent o the injury. Entirely lacking is the slightest sugges tion that the machine possessed a latent defect o a danger unknown to plaintiff; entirely lacking is any recital that the absence of guards or a stopping devic was unknown to him; and entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose. As we have observed, those omissions are fatal.

If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting

from deterioration, to furnish a machine that will not wear out (see *Auld* v. *Sears, Roebuck & Co.*, 288 N. Y. 515, affg. 261 App. Div. 918), so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous. To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if some one working around the airplane comes in contact with the propeller. In such cases, the manufacturer has the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all.

To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or, in our view, may be—imposed by judicial decision. Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against hidden defects and of giving notice of concealed dangers (See, e.g., *Rosebrock* v. *General Elec. Co.*, 236 N. Y. 227 [electric transformers, improperly packed]; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382 [defective automobile wheel]; *Statler* v. *Ray Mfg. Co.*, 195 N. Y. 478 [imperfectly manufactured coffee urn]; *Torgesen* v. *Schultz*, 192 N. Y. 156 [defective aerated water bottle]; *Devlin* v. *Smith*, 89 N. Y. 470 [imperfectly constructed scaffold].) In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, only if defect or danger be not 'known' or 'p. ent' or overable 'by reasonable inspection'.

(*Genesee Co. Patrons Fire Relief Assn.* v. *Sonneborn Sons*, 263 N. Y. 463, 468; see, also, *Noone* v. *Fred Perlberg, Inc.*, 268 App. Div. 149, 152, affd. 294 N. Y. 680; *O'Connell* v. *Westinghouse X-ray Co.*, 288 N. Y. 486, revg. 261 App. Div. 8; see, also, *Grant* v. *Australian Knitting Mills* [1936] A. C. 85; Restatement of Law of Torts, § 388, comment i, p. 1047; 3 Cooley, Law of Torts [4th ed.], § 498; Bohlen, Studies in the Law of Torts [1926], p. 126.) Language particularly apt was used by the Privy Council of England in the *Grant* case (*supra* [1936] A. C. 85); after calling attention to the fact that in *Donoghue* v. *Stevenson* ([1932] A. C. 562), 'the danger was hidden and the thing * * * dangerous only because of want of care in making it', the tribunal went on the say: 'One further point may be noted. The principle of *Donoghue's* case [1932] A. C. 562, 583, 595 [i.e., the *MacPherson* v. *Buick Motor Co.* doctrine] can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainly of mischance' (p. 105). And Professor Bohlen in his work on Torts, after noting 'the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse', goes on to say (op. cit., p. 126): 'As to this there can be no two opinions, but there is no need to invoke public policy to afford this protection. The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.'

There have been a number of cases in other states involving injuries from farming machinery and implements in which the courts have refused after trial to hold manufacturers negligent merely because the equipment was dangerous and no guards were furnished. (See, e.g., *Stevens* v. *Allis-Chalmers Mfg. Co.*, 151 Kan. 638; *Foster* v. *Ford Motor Co.*, 139 Wash. 341; *Yaun* v. *Allis-Chalmers Mfg. Co.*, 253 Wis. 588; see, also, *Davis* v. *Sanderman*, 225 Iowa 1001.) In the *Yaun* case (*supra*, 253 Wis. 558), plaintiff, while working on a hay baler, fell in such a way that his arm was caught between the unguarded rollers of the machine and was crushed. He sued the manufacturer and prevailed in the trial court. He sought an affirmance upon the theory that a manufacturer of an article functionally dangerous is liable to a user who sustains injuries " 'by reason of the manufacturer failing to exercise reasonable care in the adoption of a safe plan or design * * * *whether the danger be open or hidden*' " (emphasis supplied; p. 563). The Wisconsin Supreme Court, holding that such was not the law, reversed the judgment and dismissed the complaint. Pointing out that 'The danger of the rollers was apparent in the present case', the court quoted from one of its earlier decisions (*Dugenske* v. *Wyse*, 194 Wis. 159, 165) as follows: ' "It is true that a silo filler is a simple device. Any person of ordinary intelligence must be presumed to know that if his fingers got between the rollers and under the knives, serious consequences would result," ' (p. 568). And, added the court, 'If respondent's contention were sound, every meat grinder or other machine capable of mangling fingers would be an instrument the safe use of which would be guaranteed by the manufacturer' (p. 569).

It may well be argued that, since the development of mechanical contrivances has created so many new

dangers; manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices. If, however, the manufacturer's liability is to be so extended, if so fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change. (See Roscoe Pound, New Theories of Liability, 8 Bar Bulletin, N. Y. Co. Lawyers Assn. [May, 1950], pp. 32, 35.) In Wisconsin, for instance, such a course has been adopted with respect to 'corn shredders'; a statute requires such machines to be provided 'with safety or automatic feeding devices' in order to protect their operators from 'accident by the snapping rollers, husking rollers, and shredding knives' (Wis. Stat., 1949, § 167.12, p. 2072). The legislature of this state, however, has not acted in the field, having chosen to impose a duty only upon employers to furnish guards for certain types of machinery and appliances used in factories. (See Labor Law, § 256; see, also, e.g., *Matter of Gawrys* v. *Buffalo Bolt Co.*, 276 App. Div. 1035; *McEwen* v. *Borden's Condensed Milk Co.*, 214 N. Y. 674.)

In conclusion, then, since the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct, the complaint was properly dismissed."

***Inman* v. *Bingh. Hous. Auth.*, 3 N. Y. 2d 137, 145-146.**

"The cases establish that the manufacturer of a machine or other article, 'dangerous because of the way in which it functions, and patently so, owes to * * * [remote users] a duty merely to make it free from latent defects and concealed dangers.' (*Campo* v. *Scofield*, 301 N. Y. 468, 471.) 'We have not yet reached

the state,' we wrote in the Campo case (*supra*, pp. 472-473), 'where a manufacturer is under the duty of making a machine accident proof or foolproof. • • • Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. [Cases cited.] In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, *only if* the defect or danger be not "known" or "patent" or discoverable "by reasonable inspection".' And, since the presence of a latent defect or a danger not generally known is precedent to the manufacturer's liability, the absence of such a recital in the complaint is fatal to the existence of a cause of action.

Examination of the pleading before us discloses its invalidity. It contains no allegation of any latent defect or concealed danger. It simply complains of (1) the absence of 'a protective railing, guard or any device,' (2) the arc made by the door when opened and (3) the fact that the step did not extend the full length of the stoop, all patently obvious defects, if, indeed, they are defects at all. From none of these recitals may it be said that the architects or the builder violated a duty owed to users of the stoop. Entirely lacking, to paraphrase what we said in the *Campo* case (*supra*, 301 N. Y. 468, 741), is any suggestion that the structure possessed a latent defect or an unknown danger and, in the very nature of things, entirely lacking is any recital that the absence of a railing or other device was unknown or undiscoverable. As we have already indicated, such omissions are fatal.

Analysis of the decisions in which a remote user has recovered in tort, be it from a manufacturer, supplier or contractor, amply demonstrates how different the instant case is. Here, we have nothing like the sudden collapse of an imperfectly constructed scaffold, a de-

fective automobile wheel or a faultily erected concrete ceiling (*Devlin* v. *Smith*, 89 N. Y. 470; *MacPherson* v. *Buick Motor Co.*, *supra*, 217 N. Y. 382; *Adams* v. *White Constr. Co.*, *supra*, 299 N. Y. 641); nothing like the breaking of a poorly made handle on a coffee urn (*Hoenig* v. *Central Stamping Co.*, 273 N. Y. 485); nothing like the explosion of a defectively manufactured soda bottle, aerated water bottle or coffee urn (*Smith* v. *Peerless Glass Co.*, 259 N. Y. 292; *Torgeson* v. *Schultz*, 192 N. Y. 156; *Statler* v. *Ray Mfg. Co.*, 195 N. Y. 478); nothing like the explosion of an electric transformer, improperly packed (*Rosebrock* v. *General Elec. Co.*, 236 N. Y. 227). In short, in the present case, we have nothing that is related to, or stems from, the existence of a latent fault or hidden danger in either design or construction. The complaint reveals a one-step stoop, two steps high along a part of its length, with no railing or other protective device around it, from which an apparently unattended child fell. Whatever the defect, it may not be said to have been latent, and, whatever the danger, it certainly was not hidden. That being so, it is evident that the requirements of the MacPherson-Buick rule have not been met; the complaint of the Inmans against the architects and the builder is without legal basis and was properly dismissed at Special Term."

Said rule was also applied in the case of *Standard Conveyor Co.* v. *Scott*, 221 F. 2d 460, wherein the Court wrote at page 463:

"It is perfectly obvious that there was nothing latent hidden, or defective about the condition and that the distance between the two conveyors was open and obvious for all to see. We do not believe it can be said that the condition was inherently or imminently dangerous any more than any moving machinery may be said to be inherently or imminently dangerous. To

hold the manufacturer and installer of this equipment liable for injuries would be tantamount to holding the manufacturer and installer of any moving machinery responsible for all injuries connected with its use."

This Honorable Court denied a writ of certiorari in *Standard Conveyor Co.* v. *Scott, supra* (350 U. S. 830).

(b)

It is a fundamental principle of tort law that no action will lie in negligence unless defendant owed a duty to decedent. The absence of any duty "is immediately fatal to plaintiff's cause of action" (*Kimbar* v. *Estis*, 1 N. Y. 2d 399).

As stated in the case of *Palsgraf* v. *Long Island R.R. Co.*, 248 N. Y. 339 at page 342:

"'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.'

. . . .

'The ideas of negligence and duty are strictly correlative'."

In the absence of a duty to decedent, therefore, no issue as to defendant's negligence arose (*Duree* v. *Wabash R. Co.*, 241 Fed. 454, 457) because "a liability for negligence must depend upon a duty owed by the defendant to the plaintiff which the defendant negligently performed" (*Cohen* v. *Koster*, 133 A. D. 570, 573).

(c)

General custom and usage cannot create a duty—it is only evidence to measure reasonable care when a duty is owed.

Accordingly the case of *Regan* v. *Eight Twenty Fifth Corporation*, 287 N. Y. 179, upon which plaintiff relies in her application for writ of certiorari, is inapplicable to the issue in the instant case because the defendant in the *Regan* case owed Regan the duty of reasonable care. In its opinion the Court pointed out that "Defendant had supplied the cans and the dolly and had directed their use for the transportation of the sand." The defendant, having assumed control of Regan's work, owed him the duty of furnishing reasonably safe equipment and a reasonably safe place to work.

Since there was a duty owed the New York Court of Appeals approved the submission to the jury of the question "whether failure to comply with such usage and custom constituted a failure to exercise reasonable care under the circumstances."

Since the defendant herein owed no duty to decedent proof of general custom and usage was irrelevant.

(d)

The case of *Lee* v. *Pennsylvania R. Co.* (C. A. 2), 192 Fed. (2d) 226, is not authority for plaintiff. There was no dispute that defendant owed the 3 year old infant plaintiff a duty to exercise reasonable care to make its premises reasonably safe. Proof of custom and usage was held admissible to assist the jury in formulating the standard of care which defendant owed.

In the case at bar, however, it was established by the decisions of the New York Court of Appeals that there was no duty owed by defendant to deceased under the facts in the case.

POINT II

The petition and brief of petitioner present no issues reviewable by this Court.

There is no conflict between the decision of the Court of Appeals for the Second Circuit and the decisions of the New York Court of Appeals.

The decision of the Court of Appeals for the Second Circuit is in accord with the New York law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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